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In the

Supreme Court of the United States

DEAN SCHMITZ,

Petitioner,

v.

M & M/MARS, a division of M & M Mars, Inc.,
a Delaware corporation,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

When the trier of fact in a Title VII retaliation case makes a finding of fact that an employer intentionally retaliated against an employee because of his consistent complaints of civil rights violations.

1. Whether the trier of fact's finding regarding the sufficiency of the legitimate, non-discriminatory explanation proffered by the employer for the adverse employment action should be reviewed under a clearly erroneous or de novo standard of appellate review.

2. Whether the trier of fact's finding that an employer acted from a retaliatory motive must be set aside when one of six reasons supplied by the employer (the other five being pretext) is a sufficient basis for employer concern.

3. Whether an employee that proves that retaliation under Title VII was the motivating factor for an unlawful employment action should bear the burden of disproving the sufficiency of every legitimate, nondiscriminatory reason supplied by the employer in order to establish a violation of a Title VII.

4. Whether an employee who establishes a prima facie case of a Title VII hostile environment based retaliation claim should prevail when the employer categorically denies that the harassing activity complained of occurred but the trier of fact finds that harassment sufficient to create a hostile environment did occur.

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Dean Schmitz petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., infra, 1a to 10a) is an unpublished memorandum decision. The findings of fact and conclusions of law of the United States District Court for the District of Oregon. (App., infra, 11a to 24a) were entered April 18, 2001.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 2003. Schmitz filed a petition for rehearing en banc. An order denying that petition was entered on October 2, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

42 U.S.C. § 2000e-3(a) provides that it is "an unlawful employment practice for an employer to discriminate against any of his employees...because he has opposed any practice made an unlawful employment practice by [Title VII]."

STATEMENT

Schmitz, a Caucasian male, is a former managerial employee of Mars. Beginning in 1995 Schmitz's African-American supervisor engaged in a pattern of harassment towards him severe and pervasive enough to constitute a hostile environment.

Schmitz, based on the timing, nature and content of the supervisor's actions, maintained the harassment was race related. The harassment coincided with Schmitz voicing concerns about the supervisor's protective treatment of a poorly performing African-American employee whom Schmitz managed. The supervisor categorically denied engaging in any harassing activities. Schmitz initiated civil rights claims based on the harassment.

Schmitz was reassigned away from the supervisor in 1996. Schmitz was named Portland , Oregon retail sales manager because, in Mars' estimation, he excelled in the ability to manage third party merchandisers, possessed excellent merchandising knowledge and expertise and was the best fit for the Portland marketplace. Schmitz performed well and received praise from his new supervisor and those he managed. In mid-1999 Schmitz was laid off. Following the layoff Schmitz interviewed for five open positions with Mars, two below his managerial level, but was not offered a job. Schmitz initiated additional civil rights claims in December 1999 and February and March 2000 alleging that Mars refused to hire him because of his pending legal claims.

In Spring 2000 Mars advertised for a sales supervisor for the Portland area, a similar job to the one Schmitz had been laid off from. Schmitz submitted an application but Mars barred him from the hiring process. Mars later issued six reasons for its actions. All of Mars's reasons, other than Schmitz's use of Mars's letterhead to apply for the position, were pretextual.

The district court determined that the letterhead reason was not sufficient enough a reason to deny Schmitz the opportunity for the Portland job and that Schmitz had proved that Mars unlawfully retaliated against him because of his pursuit of civil rights claims against the company by barring him from pursuing the Portland job.

The district court stated that "I basically did not find credible the justification for barring him from participating in the interview process." App., infra, 27a. "[T]he Court remains persuaded that Defendant denied Plaintiff the opportunity to apply for the Portland RSS position in retaliation for Plaintiff's long standing, persistent pattern of protected complaints." App., infra, 31a. "I find that the Plaintiff proved, by a preponderance, a single incident of retaliation, specifically his having been deprived of the opportunity to interview...for the Portland job." App., infra, 29a. "Defendant unlawfully retaliated against him by barring him from pursuing a Portland based Retail Sales Supervisor position." App., infra, 23a.

After determining that Schmitz had been retaliated against the district court placed the burden of proof on him to establish that he would have gotten the Portland job absent Mars's retaliatory motive. The court did not award Schmitz economic damages because he failed to prove by a preponderance of the evidence that he was unemployed because of Mars's illegal activity.

With regard to Schmitz's retaliation claim stemming from the hostile environment created by his supervisor, the district court found that the

supervisor's treatment of Schmitz was severe and pervasive enough to constitute a hostile environment and that the blanket denial of all harassment by Schmitz's supervisor was incredible. The district court held that Schmitz did not prove that the hostile environment he was subjected to was related to race.

Both sides appealed. The court of appeals affirmed the district court's hostile environment holding stating that Schmitz failed to establish the supervisor's mistreatment of him was race related. The court reversed the district court's holding of unlawful retaliation for barring Schmitz from the Portland job. The court applied a de novo standard of review and found that Mars's concern over the letterhead issue was sufficient to support barring Schmitz from access to the Portland job. Jurisdiction in the district court was pursuant to 29 U.S.C. 626 and 28 U.S.C. 1331.

REASONS FOR GRANTING THE WRIT

The court of appeals' decision to reverse Schmitz's retaliation judgment by applying a de novo review to perform its own assessment of the "sufficiency" of one of Mars's six proffered reasons invades the province of the trier of fact and violates the principles of the *McDonnell Douglas* framework of proof. Allowing a reviewing court to dispense with factual findings predicated on credibility assessments and close analysis of the evidence without employing a clearly erroneous standard of review disrupts the balance between trier of fact and reviewer. As this Court stated in *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985) a reviewing court should not "reverse the finding of the trier of fact simply because it is

convinced that it would have decided the case differently".

The court of appeals decision is in conflict with this Court's recent decision in *Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148 (2003). The court of appeals did not disturb the district court's finding that Mars's explanation for its action was not credible and that Mars was motivated by a retaliatory motive. Yet, the court reversed Schmitz's judgment because it felt Mars had justifiable concern over one of the six reasons it offered up. In *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989) this Court stated "We have, in short, been here before. Each time, we have concluded that the plaintiff who shows that an impermissible motive played a motivating part in an adverse employment decision has thereby placed upon the defendant the burden to show that it would have made the same decision in the absence of the unlawful motive." Schmitz proved at trial that Mars had a retaliatory motive. The court of appeals, without disturbing the district court's finding that Mars acted out of retaliatory intent, upended its judgment without shifting the burden of proof to Mars.

Finally, the court of appeals' decision with regards to Schmitz's hostile environment based retaliation claim is logically flawed. The court relied on legitimate, nondiscriminatory reasons that Mars produced for harassing acts that it testified never occurred. Once a prima facie case of retaliation is established and the trier of fact finds that a hostile environment existed the aggrieved employee should prevail if the employer categorically denies the harassing acts took place.

I. Trier of Fact's Determination Of What Motivated Mars To Take An Adverse Employment Action Is A Finding Of Fact And Should Not Be Set Aside Unless Clearly Erroneous

The trier of fact's determination of the question of whether an employer intentionally discriminated against an employee is the ultimate finding of fact in a Title VII case. Once evidence of a prima facie case and a legitimate, nondiscriminatory reason have been supplied "the only relevant question" is if there is sufficient evidence to conclude that the adverse employment decision was motivated by a discriminatory or retaliatory reason. *Raytheon Co. v. Hernandez*, 124 S.Ct. 513, 520 (2003). "The only issue to be decided at that point is whether plaintiffs' have proved discrimination". *Bazemore v. Friday*, 478 U.S. 385, 398 (1986).

> "Because a finding of intentional discrimination is a finding of fact, the standard governing appellate review of a district court's finding of discrimination is set forth in Federal Rule of Civil Procedure 52(a): 'Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

Anderson v. Bessemer City, 470 U.S. at 573 (1985).

The assessment of an employer's proffered rationale and of the presence or absence of a discriminatory motive "...remains a question for the fact finder to answer, subject, of course, to appellate review - - which should be conducted on remand ... under the 'clearly erroneous' standard...". *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 524 (1993).

The court of appeals engaged in de novo review of the district court's finding of retaliation. The lower court's factual finding that Schmitz established that the motivating factor for barring him was retaliation and that Mars's explanation was not credible should have been treated as a finding of fact, subject to review for clear error. [1]

The court of appeals focused on the district court's finding that "Schmitz's misuse of Mars' letterhead and logo were not sufficient enough reasons to deny him the opportunity to interview." App., infra, 21a. The court stated that the question of whether Mars's reason was "sufficient" was a mixed question of law and fact subject to de novo review. However, the "sufficiency" of an employer's evidence of a non-discriminatory motive (evaluated in conjunction with the "sufficiency" of a claimant's evidence that the decision was motivated by a discriminatory reason) is the ultimate factual question for the trier of fact to decide.

Under *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) the shifting burdens of production are designed to hone the issues for the trier of fact, thereby "progressively ... sharpen[ing] the inquiry into the elusive factual question of discrimination." *Texas Dept.*

of Community Affairs v. Burdine, 450 U.S. 248, 255 (1981). For that reason, at the stage that the employer is asked to come forward with its legitimate, non-discriminatory reasons for an adverse employment decision that production "can involve no credibility assessment." *St. Mary's Honor Center v. Hicks*, 509 U.S. at 519 (1993). Once the employee's prima facie case and the employer's rationale for its act are presented the *McDonnell Douglas* framework disappears and the question for the trier of fact is "discrimination vel non." *Reeves v. Sanderson Plumbing Products*, Inc., 530 U.S. 133, 143 (2000). "In short, the district court must decide which party's explanation of the employer's motivation it believes." *Postal Service Bd. Of Governors v. Aikens*, 460 U.S. 711, 716 (1983). At that point the trier of fact is left to assess the core question of whether the aggrieved employee has established retaliation by a preponderance of the evidence.

In reaching its decision the trier of fact should take into consideration all of the witnesses and documents presented at trial. The trier of fact is left to ponder various considerations including the credibility of the witnesses, the sequence of events and the plausibility of the competing explanations.

> "In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the fact finder is entitled to consider a party's dishonesty

> about a material fact as affirmative evidence of guilt."

Wright v. West, 505 U.S. 277, 296 (1992).

The district court considered the full scope of Mars's explanation. The pretextual nature of five of Mars's six reasons, combined with the court's credibility assessments, informed its decision that Mars was dissembling to cover up a discriminatory purpose. The insufficiency of Mars's one non-pretextual reason is a corollary factual finding to the court's overall assessment of Mars's explanation. That finding should not have been subject to de novo review and should not alone control the ultimate factual finding of retaliatory motive.

II. Trier of Fact's Determination That Mars Acted From A Retaliatory Motive Should Not Be Set Aside Because Mars Able To Produce One Reason Sufficient To Justify Concern

The court of appeals' de novo assessment of the "sufficiency" of the letterhead issue should not serve to disrupt the trier of fact's factual findings that it "did not find credible the justification for barring" Schmitz and Mars "denied Plaintiff the opportunity to apply for the Portland RSS position in retaliation for Plaintiff's long standing persistent pattern of protected complaints." App., infra, 27a, 31a.

The question for the fact finder is whether the employer's explanation is believable. *McDonnell Douglas Corp. v. Green*, 411 U.S. at 805 (1973). If, as a

matter of law, a non-pretextual reason, no matter how many pretextual reasons surround it, precludes a Title VII claimant from establishing that the employer's explanation lacks credence the door is open for employers to inoculate discriminatory employment decisions from legal action by employing a kitchen sink approach and sanitizing a host of pretextual reasons with a single non-pretextual reason. An employer may not prevail "...by offering a legitimate and sufficient reason for its discrimination if that reason did not motivate it at the time of the decision." *Price Waterhouse v. Hopkins*, 490 U.S. at 252 (1989).

The district court found that Mars barred Schmitz out of a retaliatory motive. The court of appeals did not disturb that factual finding. Rather, the court decided that the letterhead issue was a sufficient basis to create justifiable concern for Mars. But that is an insufficient basis to set aside Schmitz's judgment because the district court made the explicit factual finding that Mars barred Schmitz from employment in retaliation for his civil rights complaints. The district court's finding about what actually motivated Mars should trump the court of appeals' finding that one of six otherwise pretextual reasons was enough to justify concern.

III. Once An Employee Proves That An Employer Acted Out Of A Retaliatory Intent The Burden Of Proof Should Shift To The Employer To Prove It Would Have Taken The Same Action Irrespective Of Its Discriminatory Motive

The court of appeals ignored *Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148 (2003). The question before this Court in that case was "whether a plaintiff must present direct evidence of discrimination in order to obtain a mixed motive instruction under Title VII." Id. at 2150. This Court concluded that a Title VII claimant can establish a case by either direct or circumstantial evidence and no heightened evidentiary showing is required to obtain a "mixed motive" instruction to the trier of fact. Id. at 2153. Such an instruction informs the trier of fact that the plaintiff establishes a Title VII violation if the plaintiff's protected class was a motivating factor in the defendant's treatment of the plaintiff, even if the defendant's conduct was also motivated by a lawful reason and that the plaintiff is entitled to damages unless the defendant proves it would have treated the plaintiff in a similar fashion even if the plaintiff's protected class played no role in the decision.

The district court made a clear finding that Mars had a retaliatory motive in barring Schmitz from employment. Although Schmitz's case was not analyzed under a mixed motive framework this Court's decision in *Desert Palace, Inc. v. Costa* establishes that "direct" evidence of discriminatory motive is not required to apply a mixed motive style analysis. [2]

Once Schmitz proved that "Defendant denied Plaintiff the opportunity to apply for the Portland RSS position in retaliation for Plaintiff's long standing, persistent pattern of protected complaints" the burden of proof should have shifted to Mars to establish that it would have taken the same action in the absence of a retaliatory motive. [3]

At the core of every Title VII case lies the ultimate question of whether a discriminatory motive was behind the adverse employment decision. If the evidence supports a finding that discrimination is one of two or more possible reasons for the adverse action the trier of fact should determine whether a discriminatory reason was a motivating factor. If so, a Title VII violation has occurred. The employer can then attempt to prove its affirmative defense to damages.

The presence of a single, non-pretextual reason for the adverse employment action does not serve to preclude a claimant from proving his case. "An employer may not, in other words, prevail in a mixed-motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision." *Price Waterhouse v. Hopkins*, 490 U.S. at 252 (1989).

Interestingly, the damage issue Schmitz raised before the court of appeals, premised on the Ninth Circuit case of *Ruggles v. California State University*, 797 F.2d 782 (9th Cir. 1986), mirrors the *Desert Palace, Inc. v. Costa* mixed motive analysis. Schmitz argued that once the district court decided that Mars had barred him from employment out of a retaliatory motive the burden of proof should have shifted to Mars to prove that he would not have been hired in the

absence of retaliatory intent. That issue was never addressed because the court of appeals supplanted the district court's finding of retaliation.

IV. Once An Employee Establishes A Prima Facie Case Of Retaliation And Proves A Hostile Environment He Is Entitled To Judgment If The Employer Categorically Denies The Actions That Created The Hostile Environment

Under *Ray v. Henderson*, 217 F.3d 1234 (9th Cir. 2000) a hostile working environment satisfies the adverse employment action element for a Title VII retaliation claim. The district court found that Schmitz was subjected to a hostile environment by his supervisor and the court of appeals did not disturb that finding. Schmitz established a prima facie case of retaliation by showing he engaged in protected activity (i.e., advocating for race neutral treatment of employees in the face of managerial resistance) and suffered a hostile environment in conjunction with his protected activity. Once Schmitz made out a prima facie case, the burden shifted to Mars to articulate same legitimate, nondiscriminatory reason for the adverse employment action. *McDonnell Douglas Corp. v. Green*, 411 U.S. at 802 (1973).

If the employer is silent in the face of the presumption created by the prima facie case the court must enter judgment for the plaintiff. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. at 254 (1981).

Mars, through the testimony of its supervisor, categorically denied committing every act which

formed the basis of the hostile environment the district court found existed. Complete denial of all harassment that the court determined did in fact occur is, functionally, no different than silence. Logically, Mars cannot provide legitimate, non-discriminatory reasons for actions that it denies took place. Mars's blanket denial precludes it from meeting its burden and Schmitz is entitled to judgment on his hostile environment based retaliation claim.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED this 31st day of December 2003.

Respectfully submitted,

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FOOTNOTES

[1] Judge Fisher, in his concurring opinion, was uncomfortable with the application of de novo review. "I am troubled, however, by the majority's de novo analysis of the 'sufficiency' of Mars' proffered nondiscriminatory reason for denying Schmitz an interview." App., infra, 8a.

[2] The Costa opinion issued after the case at bar had been tried, decided, appealed and briefed. Schmitz discussed it with the court at oral argument.

[3] As Judge Fisher's concurrence stated

> "An alternative understanding of the district court's 'sufficiency' statement might be that, under a mixed motive analysis, although Mars was motivated by both legitimate and illegal reasons, Mars would not have refused to interview Schmitz in the absence of the retaliatory motive. *Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148, 2150 (2003). Such a finding would be reviewed for clear error."

App., infra, 10a.

(Any footnotes trail the end of each document)

Nos. 01-35899, 01-35936

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DEAN SCHMITZ,
Plaintiff - Appellant, Cross-Appellee

v.

M & M/MARS, a division of M & M Mars, Inc., a Delaware corporation,
Defendant - Appellee. Cross-Appellant

March 3, 2003, Argued and Submitted,
Portland, Oregon
August 11, 2003, Filed

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JUDGES: Before: O'SCANNLAIN, FERNANDEZ, and FISHER, Circuit Judges. FISHER, Circuit Judge, Concurring.

OPINION: MEMORANDUM *

After a one-week bench trial, the district court granted Dean Schmitz partial relief on his various Title VII claims against M&M/Mars ("Mars"). Schmitz appeals and Mars cross-appeals from the district court judgment. Because the relevant facts are known to the parties they are not repeated here.

I

Schmitz challenges the district court's denial of his hostile work environment-based retaliation claim. Schmitz contends that the district court erred because there was sufficient evidence to establish that supervisor Carl Ruffin engaged in inappropriate, racially motivated misconduct. While it found that Ruffin could be abusive and that he lacked credibility as a witness, the district court nonetheless concluded that Schmitz failed to establish adequately that Ruffin's

harassment was race based.

We agree with the district court which explicitly found that Ruffin treated other Mars associates in a similar manner. When a manager treats employees of different genders and races in the same manner, even if offensive, it is not actionable under Title VII. See Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80, 140 L. Ed. 2d 201, 118 S. Ct. 998 (1998) ("Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at discrimination ..."). Thus, the mere fact that Ruffin verbally accosted Schmitz, as he did to other employees under his supervision, does not by itself implicate Title VII.

Moreover, the record shows that the allegedly racially motivated decision to retain sales associate Daryl Bell despite his under-performance--the primary point of contention between Ruffin and Schmitz--was made by a reviewing panel of supervisors. While agreeing with Schmitz that Bell's performance warranted a "needs improvement" rating, the panel disagreed with his further recommendation that Bell be discharged. The decision to keep Bell as an employee, therefore, was not even within Ruffin's discretion. n1

The district court further determined that during the relevant time period Schmitz never reported allegations of race-based harassment to either Steve Collins, Ruffin's manager, or to the Personnel and Organization department ("P&O"). n2 When Schmitz finally did file a complaint with P&O concerning Ruffin's conduct, Mars conducted an investigation. The company concluded that although Ruffin's conduct was inappropriate, it was not racially motivated. Ruffin was

subsequently disciplined by Mars for his unprofessional behavior.

Finally, the district court found that Ruffin consistently recommended to supervisory panels that Schmitz's work warranted a "meets expectation" job performance. Schmitz received the exact same rating from other managers during his tenure at Mars. Indeed, the district court found that "none of Schmitz's managers believed an 'exceeds expectation' rating was warranted for him." The entirety of these factors more than support the district court's determination that Schmitz failed to state a prima facie case of retaliation. Schmitz simply failed to establish that Ruffin's mistreatment of him was racially motivated.

II

Turning to the cross-appeal, Mars challenges the district court's finding of retaliation based on the company's refusal to interview Schmitz for a retail sales supervisor ("RSS") position. Mars notes that the district court itself recognized that the company had a legitimate, nondiscriminatory reason for denying Schmitz an interview.

Indeed, the district court found: "All of Mars' proffered reasons for denying Schmitz the opportunity to interview for the RSS job, except for Schmitz's issuance of correspondence using Mars' logo or letterhead, were pretextual." Nevertheless, it concluded that "Schmitz's misuse of Mars' letterhead and logo were not sufficient enough reasons to deny him the opportunity to interview." Whether Mars's proffered non-pretextual reason was "sufficient" is a

mixed question of law and fact, and thus we review the district court's determination de novo. See Nichols v. Azteca Restaurant Enter., Inc., 256 F.3d 864, 871 (9th Cir. 2001).

Such analysis leads us to disagree respectfully with the district court and to conclude that Mars had ample cause to be concerned over Schmitz's improper use of company supplies. Schmitz was laid off in June 1999 and submitted his application for the RSS job opening in April 2000. That means that for almost a year Schmitz had in his possession the computer software necessary to generate Mars's logo on his personal correspondence.

Mars had no idea to whom Schmitz had been representing that he was still an employee of the company. When it received Schmitz's job application on company letterhead in a company envelope, all that Mars knew was that a former employee who had been laid off in a company reorganization the previous year was sending it correspondence using its own stationery. Mars's concerns were well-founded as it later discovered that Schmitz had used the letterhead in correspondence with the EEOC among others.

Mars further claims that it takes great care in protecting against improper use of its name and logo. Nothing in the record demonstrates that this is mere pretense; nor is there any evidence to suggest that Mars has previously overlooked the misuse of its logo and letterhead by former employees. It is quite reasonable for Mars to expect its management-level employees, like the position for which Schmitz was applying, to be responsible, trustworthy, and able to represent effectively the company in a professional

manner. Misappropriation and fraudulent use of the company's stationery in one's job application does not convey such a message.

We therefore conclude that Mars's justifiable concern over Schmitz's improper use of company property and false representation as a company employee is more than "sufficient" to support its rejection of Schmitz's job application. n3 Accordingly, we must reverse Schmitz's retaliation judgment.

III

For the foregoing reasons the judgment is

AFFIRMED IN PART AND REVERSED IN PART.

FOOTNOTES

* This disposition is not appropriate for publication and may not be cited to by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

n1 Schmitz alleges that Ruffin in 1996 made the following statement: "[Bell] is black. I am black. Need I say more?" Schmitz further claims that Ruffin attempted to show a picture of Bell during the panel's assessment of his job performance. These assertions, however, were not part of the district court's factual findings, and Schmitz has not argued in his briefs that the district court's findings as to these issues were clearly erroneous.

n2 Schmitz contests this finding of fact. Generally, we "accept the lower court's findings of fact unless upon

review we are left with the definite and firm conviction that a mistake has been committed." United States v. Doe, 155 F.3d 1070, 1074 (9th Cir. 1998) (en banc). Here, it is impossible to see how the district court's finding is clearly erroneous. The court, in weighing the testimony of Collins and Schmitz in addition to other circumstantial evidence, reasonably concluded that Schmitz never communicated to Collins that race was a motivating factor in the demise of his relationship with Ruffin.

n3 Because we conclude that Mars's failure to interview Schmitz was not unlawful retaliation, we need not address Schmitz's further claim that he is entitled to economic damages in the form of lost income.

CONCURBY: FISHER

CONCUR: FISHER, Circuit Judge, Concurring.

I concur with the majority's conclusion that Schmitz failed to prove his retaliation-based hostile environment claim, although I believe it reads Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80, 140 L. Ed. 2d 201, 118 S. Ct. 998 (1998), too broadly.

I am troubled, however, by the majority's de novo analysis of the "sufficiency" of Mars' proffered nondiscriminatory reason for denying Schmitz an interview. As I see it, either (1) the district court's finding that the reason was "insufficient" was actually a finding of pretext, which should be reviewed for clear error, St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 524, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993); Trent v. Valley Elec. Ass'n, Inc., 195 F.3d 534, 537 (9th Cir. 1999), or (2) the finding that the reason was not pretextual should have ended the matter and any further review of sufficiency was an error of law. Unfortunately, the district court's findings of fact and conclusions of law are not a model of clarity and we are left wondering what the court intended.

The district court might have meant, despite her word choice, that she found Mars' sixth explanation -- that it refused to interview Schmitz because he submitted his application on company letterhead -- pretextual. Pretext may be shown "indirectly by showing that the employer's proffered explanation is unworthy of credence." Godwin v. Hunt Wesson, Inc., 150 F.3d 1217, 1220 (9th Cir. 1998). The district court appeared to find this type of pretext, for instance, in Mars' explanation

that it refused to interview Schmitz because he failed to participate in an exit interview when he was initially laid off. Mars had previously interviewed Schmitz for another position despite being aware of this same failure and thus, the explanation was "unworthy of credence." But an employer's proffered reason may also be found pretextual if the plaintiff persuades "the court that a discriminatory reason more likely motivated the employer." Id. The district court might have meant that Mars' sixth explanation was not "unworthy of credence" but was insufficient to convince her that discrimination was not the more likely motivation behind Mars' decision. Although mislabeled, this would be a finding of pretext subject to clear error review. n1 Trent, 195 F.3d at 537.

However, in light of the district court's explicit statement that Mars had a non-pretextual reason to refuse Schmitz an interview, I cannot strain to interpret the district court as meaning just the opposite. Thus, I take the district court's statement on pretext at face value as a finding that Mars was motivated by a non-discriminatory reason.

Once the district court concluded Mars' explanation was not pretextual, the analysis should have ended. The analysis under Title VII does not inquire into the sufficiency of an employers justification in any sense other than pretext determinations. Accordingly, I cannot join in the majority's de novo review of the sufficiency of Mars' justification. It relies on Nichols v. Azteca Rest. Enter., Inc., 256 F.3d 864, 871 (9th Cir.2001), for the proposition that questions regarding sufficiency of a non-pretextual reason are mixed questions of law and fact. Nichols, however, never

addressed such "sufficiency" determinations. Id. (noting that whether a plaintiff establishes the elements necessary to a sexual harassment or retaliation claim is a mixed question of law and fact). On the other hand, to the extent the majority's "sufficiency" analysis is actually a de novo review of whether Mars' justification was pretext, de novo review is inappropriate. Findings of pretext are pure questions of fact, which we must review for clear error. Hicks, 509 U.S. at 524; Trent, 195 F.3d at 537.

Because the district erred in conducting a "sufficiency" analysis after determining that one of Mars' proffered reasons for its actions was not pretextual, I concur in the result reached by the majority.

FOOTNOTES

n1 An alternative understanding of the district court's "sufficiency" statement might be that, under a mixed motive analysis, although Mars was motivated by both legitimate and illegitimate reasons, Mars would not have refused to interview Schmitz in the absence of the retaliatory motive. Desert Palace, Inc. v. Costa, 156 L. Ed. 2d 84, 123 S. Ct. 2148, 2150 (2003). Such a finding would be reviewed for clear error. Price Waterhouse v. Hopkins, 490 U.S. 228, 255, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (1989). However, from the record I must conclude that the district court proceeded exclusively under the traditional McDonnel Douglas model. The district court did not explicitly refer to a mixed motive theory, nor was it argued either in the district court or on appeal.

CV98-825-BR

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

DEAN SCHMITZ,
Plaintiff,

v.

M&M/Mars, a Division of Mars, Inc., a Delaware Corporation
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

April 18, 2001

FINDINGS OF FACTS

1. Schmitz, a Caucasian male, worked for M&M/Mars from 1983 to 1999.

2. From 1983 to 1992, he worked in Northern California as a Sales Representative.

3. In January 1993, Ruffin promoted Schmitz to the position of Retail Sales Manager in the Portland, Oregon area. This was the first management position held by Schmitz.

4. Schmitz managed six sales associates, including Daryl Bell (African-American), Monteblanco (Hispanic; Schmitz perceived Monteblanco to be African-

American), Ludwig and Hand (females), Bee (Asian) and Wilson (Caucasian).

5. Schmitz's manager was Carl Ruffin, an African-American. Schmitz and Ruffin had become friends working together in Califomia.

6. Ruffin hired Bell.

7. Every year, each Mars associate receives a performance review and a rating. The associate's supervisor recommends a rating to a panel which decides the final rating.

8. For the year 1993, Daryl Bell received a needs improvement rating. An associate receiving a needs improvement rating is placed on a special plan with performance objectives. Failure to meet the objectives can lead to termination.

9. For the year 1994, Daryl Bell received another needs improvement rating. Schmitz discussed the issue of terminating Bell during the panel review meeting for Bell in early 1995.

10. After the panel review, panel member Gustafson heard Schmitz voice concerns that Ruffin and MacCottrell were protecting Bell for racial reason. Gustafson was Schmitz's peer, not his manager. Schmitz did not report to Gustafson any allegation that Ruffin's conduct was race-based. Schmitz did not report any race-based issue to any P&O manager until February 1997.

11. Following the 1994 panel review, Bell was placed

on a performance-plan.

12. Problems with Bell's performance continued, however, Schmitz did not make a written performance improvement plan for Bell. Schmitz made oral reports to Ruffin from time to time about B ell's performance problems.

13. In April/May 1995, Ruffin began placing late night phone calls to Schmitz in conjunction with Schmitz reports concerning Bell. Ruffin made 5-6 late night calls to Schmitz, several of which dealt with Bell. Some of these calls were angry in tone and contained comments Schmitz perceived as threats. Ruffin treated some other Mars' associates similarly.

14. Some of the calls referenced Bell and some referenced trivial, unconnected matters.

15. The calls caused Schmitz upset and distress.

16. Ruffin threatened Schmitz's job and placement in the upcoming reorganization, however, Schmitz failed to prove these threats were race based.

17. In July 1995, Ruffin reacted angrily to Schmitz's mid-year report on Bell.

18. Around this the, Schmitz reported concerns over Ruffin's harassment to Steve Collins, Ruffin's manager, but he did not suggest that Ruffin's treatment of him was race based. Mars had a written policy in place prohibiting harassment, racial discrimination and retaliation. The policy provides for a procedure whereby associates can complain to Personnel and

Organization (P+O) about harassment.

19. Schmitz was reluctant to make complaints to John MacCottrell and P+O because MacCottrell and Ruffin were friends, both were African- American and Ruffin used MacCottrell's name as a threat.

20. In August 1995, Ruffin phoned Schmitz late at night and threatened him with personal trouble.

21. A co-worker, Christina Shaw, who saw Schmitz the next day, noticed him visibly upset and shaken. She saw Ruffin "dress down" Schmitz to the embarrassment of many associates. Schmitz complained to Shaw that Ruffin was protecting Bell for racial reasons.

22. At that same meeting, a Mars' associate overheard Ruffin tell Bell that Mars needed more black associates.

23. Throughout Schmitz's entire career at Mars, he received annual performance ratings of "Meets Expectations." In April 1996, Ruffin presented Schmitz with a "Meets Expectation" review that also contained a negative assessment of Schmitz's interactions and relations with his sales associates.

24. Schmitz, Ruffin and Collins held a meeting in April 1996.

25. Schmitz did not tell Collins in April 1996 that race was causing the deterioration in his relationship with Ruffin. At no time prior to 1997 did Schmitz document any allegation regarding race, though he did extensively document harassment allegations.

26. In September 1996, Mars reorganized and Schmitz was given a post in Portland as a Retail Sales Manager managing third party brokers. This position carried the same zone level and salary as his previous position.

27. Schmitz's new manager was Caroline Kies.

28. In September 1995, Bell left Mars.

29. In October 1996, Ruffin sent Kies a supplemental review for 1996.

30. Kies contacted Ruffin in January 1997 about the supplemental review. Ruffin was accusatory of Schmitz and defensive.

31. Schmitz filed a complaint with Mars' P+O against Ruffin in early 1997.

32. Mars investigator Storey interviewed Schmitz and the individuals identified by Schmitz.

33. Mars investigated Schmitz's complaints and found that Ruffin had engaged in inappropriate conduct for a Mars manager, including that he lacked sensitivity, would make threatening remarks, managed by intimidation and was perceived to have threatened retaliation. Storey's investigation concluded that Ruffin's conduct was not race-based.

34. As a result, Ruffin was disciplined.

35. On July 28, 1997 Schmitz filed a claim for violations of Title VII with the E.E.O.C.

36. In 1998 and 1999, Schmitz received meets expectations ratings from his manager, Kies and Blachowski. None of Schmitz's managers believed an "exceeds expectation" rating was warranted for him.

37. On July 7, 1998, Schmitz filed a complaint for violations of Title VII, initiating this action in this Court.

38. In June 1999, Mars laid off approximately 280 associates, 32 of whom were Zone 7-1 level employees like Schmitz.

39. Associates were selected for layoff based upon a universally applied ranking system, using objective criteria. Based on these criteria, Schmitz was ranked and selected for layoff.

40. Schmitz, like all others slated for termination as a result of the reorganization, was given the opportunity to apply for open jobs available through the Company's Opportunity Awareness Program ("OAP"). Through the OAP, Schmitz could attempt to retain employment by obtaining a different job despite the fact that he was slated for termination. The OAP generally consisted of a written assignment, an individual presentation and a panel interview. A panel of managers evaluated the candidates in each of these areas. The panel is comprised of the hiring manager, a second manager and at least one manager from P&O. Schmitz interviewed for five jobs he expressed interest in, which were all located on the West Coast. Four of the five hiring panels contained one P&O manager with knowledge of Schmitz's protected activity. Those positions were: (1) Zone 7-2 Branded Vend; (2) Zone 7-1

VSA Account Manager; (3) Zone 7-2 Core Mark Telesales; and (4) Zone 7-1 Core Mark Account Manager. The P &O manager on four of the panels for the OAP jobs Schmitz applied for knew of Schmitz's lawsuit. The P&O manager did not communicate it to the other panel members, who were unaware of Schmitz's lawsuit, and did not consider it.

41. Schmitz did not get any of the jobs he interviewed for.

42. Two of the jobs he did not get were Zone 7-2 jobs, a zone lower than his position at the time of the layoff.

43. Associates to be laid off could purchase their laptop computers for $350 or return them.

44. At some point, Schmitz advised Mars in writing that he intended to keep his laptop. Schmitz intended that the charge for the computer be deducted from his final direct deposit, but that did not occur.

45. Following Schmitz's final day in August 1999, Mars made no attempt to contact or advise Schmitz of a concern with the return of his computer until May 24, 2000, after it received a job application from Schmitz which he, transmitted with a letter printed on Mars' letterhead.

46. Schmitz declined an exit interview and timely completed his exit interview checklist August 1999.

47. The exit interview was not mandatory and Schmitz received no notice, either before or after

declining the interview, that there would be any negative impact on reemployment opportunities with the company from declining the interview.

48. On December 22, 1999, Schmitz filed an additional claim of retaliation with the E.E.O.C.

49. On February 11, 2000 and March 31, 2000, Schmitz filed amended complaints in this action to include additional retaliation claims.

50. April 2000, Mars placed an ad on Monster.com for a Mars Retail Sales Supervisor position located in Portland, Oregon.

51. This job was similar to the Retail Sales Manager job Schmitz previously held.

52. Schmitz sent in his application in late April 2000, together with recommendations from two third party broker managers in the Portland area and the recommendation of his most recent supervisor at Mars, Robert Blachowski.

53. Schmitz sent in his application letter using Mars' letterhead and envelope. The letterhead came from a template on his computer and the envelope, was a Mars envelope he had found in his house following the 1999 layoff.

54. On May 4, 2000, Mars wrote Schmitz a letter asking him to return or purchase his computer.

55. In July 2000, Schmitz was provided, by response to interrogatory, the following information.

1. Erin Hirsch, Sales P+O manger, made the decision to bar Schmitz from competing for the Portland RSS position, with input from fellow P+O manager, Gerald Joiner.

2. The reasons Schmitz is barred were: (1) Mr. Schmitz's continued failure to return company property; (2) Mr. Schmitz's continued use of company letterhead and supplies despite being asked to return such equipment and supplies and after he was no longer employed by M&M/Mars; (3) Mr. Schmitz's failure to cooperate in the exit interview process; (4) Information provided by former associates managed by Mr. Schmitz called into question his ability to manage others; (5) Mr. Schmitz's attitude toward the job itself and (6) The fact that the company as a part of the 1999 Sales Reorganization did not downzone or place any Zone 7-1 associate in a Zone 7-3 job.

56. When Schmitz interviewed for a VSA Account Manager job on September 9, 1999, Mars did not raise the issues of failure to participate in an exit interview, a bad attitude towards his job or information from Mars' associates calling into question Schmitz's ability to manage others. The other reasons Mars gave for denying Schmitz the RSS position in 2000 were either not in existence yet or not relevant to the VSA position.

57. Schmitz, in over 16 years with Mars, had never had any complaint of impropriety raised with regard to use of company funds or property.

58. There were no internal Mars candidates for the Portland RSS job.

59. Mars considered that Schmitz had a negative attitude to the job based on his prior complaints about being moved to a job that did not manage Mars associates, but the Court finds that explanation is not credible, in light of all the circumstances.

60. As a former Mars associate, Schmitz should not have been using company letterhead or logos in communication to anyone. Schmitz was required to return all company property including letterhead and envelopes at the time of the layoff. Schmitz used Mars' letterhead and logo on multiple occasion in 1999-2000 after having been separated from Mars, including sending letters on Mars' logo to Mars, EEOC and others. Although Mars had no information Schmitz had used Mars' letterhead for any other purpose other than applying for the RSS position, Mars was justifiably concerned with that use of letterhead. That concern was not a sufficient reason for Mars to deny Schmitz an interview for the Portland RSS job.

61. The person Mars hired for the Portland RSS position had no experience in candy sales.

62. Schmitz sustained actual distress when denied the opportunity to seek the RSS position.

CONCLUSIONS OF LAW

1. With regards to Counts 1 (hostile environment) and 2 (retaliation) of Schmitz's Third Amended Complaint, Ruffin's treatment of Schmitz was severe and pervasive enough to constitute a hostile environment. However, Schmitz failed to establish by a preponderance of the evidence that the harassment was

based on Schmitz's, or anyone else's, race. Therefore, that conduct was not in violation of Title VII, on either a hostile environment or a retaliation claim for relief.

2. Since a violation of Title VII was not established, no finding is made as to Mars' affirmative defense. With regard to Count 3 of Schmitz's Third Amended Complaint, Schmitz failed to establish by a preponderance of the evidence any causal connection between Schmitz's EEOC or federal Title VII claims and the fact that others were selected rather than Schmitz for the four OAP jobs in 1999. Therefore, Schmitz failed to establish a prima facie case of Title VII retaliation as to those claims.

3. With regard to Count 4 of Schmitz's Third Amended Complaint, Schmitz established a prima facie case of retaliation with regard to the Portland RSS job application based on the timing alone between the filing of his second EEOC filing in December 1999 and the filing of amendments to his lawsuit in February and March 2000, and the denial of his application for the RSS job in May 2000. All of Mars' proffered reasons for denying Schmitz the opportunity to interview for the RSS job, except for Schmitz's issuance of correspondence using Mars' logo or letterhead, were pretextual. However, Schmitz's misuse of Mars' letterhead and logo were not sufficient enough reasons to deny him the opportunity to interview. Schmitz suffered emotional distress from the denial of his application for the Portland RSS job which is distinguishable from non-compensable distress arising from Ruffin's conduct or the 1999 layoff. Schmitz's emotional distress claim is compensable in the amount of $25,000.

4. Schmitz did not prove he is unemployed today because of any illegal conduct by Mars. Therefore, Schmitz is not entitled to any economic damages in the form of lost income, benefits or pension. Nor is Schmitz entitled to punitive damages.

5. Schmitz is entitled to recover attorney's fees and costs in an amount to be determined by the Court.

DATED this 18th day of April, 2001.

s/ Anna J. Brown
HONORABLE ANNA J. BROWN
U.S. DISTRICT COURT JUDGE

Respectfully Submitted,

HOLLANDER, LEBENBAUM & GANNICOTT

GORDON S. GANNICOTT, OSB #84230
PHILIP M. LEBENBAUM, OSB#86062
Of Attorneys for Plaintiff

CV98-825-BR

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

DEAN SCHMITZ,
Plaintiff,

v.

M&M/Mars, a Division of Mars, Inc., a Delaware Corporation
Defendant.

JUDGMENT

April 18, 2001

THIS MATTER having come for trial on February 27 and 28, 2001 and March 1, 2 and 5, 2001, before the Honorable Anna J. Brown and the parties having waived trial by jury and the court having heard the testimony presented by the parties and reviewed the exhibits and joint deposition summaries submitted by the parties and having heard and considered the arguments of counsel;

IT IS HEREBY ORDERED that Plaintiff shall have judgment against Defendant for $25,000 in non-economic compensatory damages on Plaintiffs claim that Defendant unlawfully retaliated against him by barring him from pursuing a Portland based Retail Sales Supervisor position.

IT IS FURTHER ORDERED that Schmitz failed to

prove by a preponderance of the evidence, his hostile environment claim, his hostile environment based retaliation claim and his retaliation claim based on Defendant's failure to hire him for positions for which he interviewed following his layoff in 1999.

IT IS FINALLY ORDERED that Plaintiff have a judgment against Defendant for attorney's fees and costs in an amount to be determined by the Court.

DATED this 18th day of April, 2001.

s/ ANNA J. BROWN
U.S. DISTRICT COURT JUDGE

Submitted By;

HOLLANDER LEBENBAUM GANNICOTT

GORDON S. GANNICOTT, OSB #84230
PHILIP M. LEBENBAUM, OSB #86462

Nos. 01-35899, 01-35936

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DEAN SCHMITZ,
Plaintiff - Appellant, Cross-Appellee

v.

M & M/MARS, a division of M & M Mars, Inc., a Delaware corporation,
Defendant - Appellee. Cross-Appellant

October 2, 2003

ORDER

Before: O'SCANNLAIN, FERNANDEZ, and FISHER, Circuit Judge.

The panel voted unanimously to deny the petition for rehearing. Judge Fernandez recommended denial of the petition for rehearing en banc, and Judges Fisher and O'Scannlain voted to deny the petition far rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banv are DENIED.

Case No. CV-98-825-BR

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DEAN SCHMITZ ,
Plaintiff,

V.

M&M/MARS, a division of M &M Mars, Inc., a
Delaware corporation,
Defendant.

April 16, 2001

TRANSCRIPT OF PROCEEDING
(Oral Argument)
BEFORE THE HONORABLE ANNA J. BROWN

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Transcript page number 25

Court: I basically did not find credible the justification for barring him from participating in the interview process.

CV 98-825 BR

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DEAN SCHMITZ ,
Plaintiff,

VS.

M&M/MARS, a division of M &M Mars, Inc., a
Delaware corporation,
Defendant.

March 5, 2001

TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE ANNA J. BROWN
UNITED STATES DISTRICT COURT JUDGE

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Proceedings recorded stenographically, computer-aided transcription.

Transcript page number 970

Court: Now, that leads then to the conclusion that I find that the plaintiff proved, by a preponderance, a single incident of retaliation, specifically, his having been deprived of the opportunity to interview impartially for the Portland job in 2000. But I have also found that plaintiff has failed to prove that he would have received this job and any other job had he been impartially considered.

CV 98-825-BR

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

DEAN SCHMITZ,
Plaintiff,

v.

M&M/Mars, a Division of Mars, Inc., a Delaware Corporation
Defendant.

August 31, 2001

OPINION AND ORDER

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Page number 7

Court: Plaintiff argues direct and circumstantial evidence in the trial record and those facts specified in

the court's written Findings of Fact all support the causation element of his claim of retaliation, and render amendment of the Judgment unnecessary.

As trier of fact, the Court agrees, notwithstanding Defendant's advocacy to the contrary. Based on the court's Findings of Fact in the context of the trial record a a whole, and specifically moving beyond the threshold evidence of timing, the Court remains persuaded that Defendant denied Plaintiff the opportunity to apply for the Portland RSS position in retaliation for Plaintiff's longstanding, persistent pattern of protected complaints. In any event, the extensive trial record in this matter is significantly different from the sparse evidence in the summary judgment record in Breeden. As a consequence, the Supreme Court's decision in Breeden compels only a modification of Conclusion of Law No. 3 to reflect that the Court's judgment for Plaintiff is not based on the evidence of "timing alone."